

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CARIDAD A.,

Claimant,

OAH No. N2005110656

vs.

SAN ANDREAS REGIONAL CENTER,

Respondent.

DECISION

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter in Salinas, California, on January 30, 2006.

Claimant Caridad A. represented herself. She was assisted by a Spanish-speaking interpreter.

Jacques Maitre, M.S.W., Director's Designee for Fair Hearings, represented Respondent San Andreas Regional Center.

The record closed on January 30, 2006.

ISSUE

Whether Claimant is eligible for regional center services because she is either mentally retarded or because she suffers from a substantial developmental disability that is related to mental retardation and/or that requires similar treatment.

FACTUAL FINDINGS

1. Claimant, born June 3, 1983, is currently 22 years of age. She was born in Mexico and immigrated with her family to California when she was approximately 17 years of age. Claimant has cerebral palsy resulting in spasticity in both feet and possible hip dysphasia. She no longer wears leg braces, but still walks slowly. Claimant resides with her father and three younger siblings. Her mother currently resides in Mexico.

Claimant applied for regional center services with the assistance of a former teacher, Ann Kaska-Gams, who accompanied her to the fair hearing. Respondent found her not eligible, she appealed and this hearing followed.

2. Upon arrival in the Salinas area, Claimant enrolled in Alisal High School in the Salinas Union High School District. Although she was 17 years old, she was placed in the 9th grade.

On May 17, 2001, Claimant was referred for a psychoeducational evaluation. Mary von Witzleben, Ph.D., a school psychologist, conducted the evaluation. She utilized various assessment procedures and conducted some of the testing in Spanish. The Vineland questionnaire concerning adaptive functioning was administered to Claimant's mother in Spanish. How much of the evaluation was conducted in English and how much in Spanish is not revealed in the written report.

Dr. von Witzleben concluded that Claimant qualified for special education services due to significant delays in achievement, ability and adaptive behavior. Relative strengths included visual problem solving. Relative weaknesses were found in visual and auditory memory. Recommendations included concrete step-by-step directions and a repetitive format.

3. On October 14, 2003, Rose Alvarado, a speech and language specialist, conducted a speech and language assessment. Tests were administered to Claimant in Spanish. In contrast to some of von Witzleben's findings, Alvarado found normal abilities in auditory sequential memory, encoding and auditory association. Difficulty was found in sentence repetition and story comprehension. Alvarado wrote: "[Claimant] appears to be unable to retain information when there is no visual anchor for her." Claimant qualified for speech services in order to improve comprehension and accelerate English acquisition.

4. The only school records submitted other than assessments were Individualized Educational Plan (IEP) documents dated April 4, 2003. The reports reveal that Claimant had been enrolled in a special day class except for physical education and some electives. Academic achievement testing in March of 2002 revealed grade-level equivalents ranging from 2.3 to 5.7. However, Claimant did achieve the "normal" amount of one years' growth during the 2002/2003 school year in reading and in math. The IEP meeting notes describe Claimant as doing well in her mainstream and special education math class. It is written: "She is a diligent worker who always tries her best. The main issue for her is the need to assert herself and participate more." Apparently, Claimant received a certificate of completion from high school. Claimant requested enrollment at Salinas Adult School for the following school year.

5. Ann Kaska-Gams is a teacher at Salinas Adult School. She met Claimant when Claimant was enrolled in her Community Living class. Kaska-Gams testified that most of the students in this class are SARC clients. The subjects taught include cooking, computer

use, mobility, sex education and janitorial. Currently, Claimant is enrolled in Kaska-Gam's class one day each week and in a cooking class.

Claimant approached Kaska-Gams and asked if she could help her obtain services like her friends in the adult school receive — independent skills training and job coaching. Kaska-Gams referred Claimant to Respondent because she assumed that Claimant suffered from mental retardation. She believes Claimant could be successfully employed with assistance from a job coach. This would possibly not be needed on a long term basis, but “just to get her started.”

6. Pursuant to her application for regional center eligibility, Dr. Arnold Herrera, Ph.D., conducted a psychological evaluation on April 22, 2005. He assessed Claimant's intellectual and adaptive functioning. Dr. Herrera administered the Wechsler Adult Intelligence Scale-Third Edition. Claimant's scores included the following:

Verbal IQ	79
Performance IQ	83
Full Scale IQ	79

These IQ scores are in the low-average range. Dr. Herrera therefore opined that Dr. von Witzelben's report “clearly underestimated [Claimant's] abilities.” Dr. Herrera diagnosed Claimant with Communication Disorder NOS with slight auditory processing difficulties and Learning Disorder NOS. These diagnoses were based in part upon low verbal subtest scores in the areas of Fund of Retained Knowledge and Arithmetic and low nonverbal subtest scores in Coding.

Dr. Herrera concluded that Claimant does not suffer from mental retardation. In addition, he opined that she does not function similarly to a mentally retarded individual.

7. Neil A. Hersh, Ph.D., is a staff psychologist employed by Respondent. He reviewed all of the documentation available including previous testing results, records and Dr. Herrera's report, and testified at the hearing. Dr. Hersh has confidence in Dr. Herrera in part because Dr. Herrera speaks Spanish and has experience in testing in Spanish. This is important when assessing individuals like Claimant who are new to the United States and have limited ability in English.

Dr. Hersh emphasized the “scatter” in Dr. Herrera's test results. He stated that some of the results are pretty good, some are in the borderline range (not necessarily retarded) and some are in the low-average range. There is not a broad collection of impaired scores and “people with mental retardation have scores that are homogeneously depressed.” Claimant, however, “has scores well within normal range and some very weak. And that is consistent with specific learning disabilities.”

8. Dr. Hersh also noted that Claimant's Vineland test results in 2005 were considerably different than the 2001 results. The first testing was done when Claimant was a recent immigrant. On the second occasion, Claimant answered the questions herself and the scores were considerably higher. Clearly, she progressed considerably in adaptive functioning during the four-year period.

9. Dr. Hersh was more confident in the accuracy of Alvarado's 2003 speech and language testing results. They are consistent with Dr. Herrera's findings. Again, Claimant was able to perform within normal limits except as regards auditory processing. This is consistent with her learning disability. In addition, Dr. Hersh finds noteworthy the growth Claimant made in math and reading in the period of one school year.

Overall, Dr. Hersh believes that Claimant has specific learning disabilities and some physical difficulties, but that she has a "cognitive capacity that is far greater than she has assumed and that people in the past have assumed."

10. A diagnosis of mental retardation requires satisfaction of three criteria:¹

A. Significantly subaverage intellectual functioning, defined by an IQ of about 70 or below obtained by assessment with a standardized testing instrument, and

B. Significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional intellectual skills, work, leisure, health and safety, and

C. Onset before age 18.

The evidence did not demonstrate that Claimant has mental retardation. Her IQ scores were considerably above 70 and she does not have significant limitations in at least two areas of adaptive functioning.

APPLICABLE LAW AND REGULATIONS

1. The governing law is found in Welfare and Institutions Code section 4500 et seq., commonly known as the Lanterman Act. At section 4501 the Legislature declares the State of California's responsibility for persons with developmental disabilities. The Supreme Court has stated that the purpose of the Act:

¹ Diagnostic criteria are taken from the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (DSM-IV).

Is two-fold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, . . . and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community.” *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.

The Act does not apply to every citizen who suffers a physical or mental handicap and is in need of assistance. Rather, a person must meet specific criteria as described in section 4512(a):

(a) ‘Developmental disability’ means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

A developmental disability not resulting from one of the four listed conditions is commonly called the “fifth category.” Eligibility under this category may be found despite normally disqualifying IQ scores where it can be shown that an individual is in fact functioning at an adaptive and cognitive level as if he or she were mentally retarded, and/or that the services he or she requires are consistent with those needed by a mentally retarded individual. It is not necessary that a claimant present as if mentally retarded in every aspect. If that were the case, there would have been no need to specify additional criteria for acceptance. However, the condition must be substantially disabling, that is, one that causes a very major impairment, and it must have originated prior to age 18.

2. Further statutory guidance is found in Title 17, California Code of Regulations section 54001:

(a) ‘Substantial Handicap’ means a condition which results in major impairment of cognitive and/or social functioning. Moreover, a substantial handicap represents a condition of sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential.

(b) Since an individual's cognitive and/or social functioning are many-faceted, the existence of a major impairment shall be determined through an assessment which shall address aspects of functioning including, but not limited to:

- (1) Communication skills;
- (2) Learning;
- (3) Self-care;
- (4) Mobility;
- (5) Self-direction;
- (6) Capacity for independent living;
- (7) Economic self-sufficiency.

3. This list of seven areas are examined to assist in the determination of whether the applicant might be a person suffering from a condition similar to or requiring services similar to mental retardation. Although intelligence testing is an important part of the analysis, it contributes only a portion of the picture. Evidence from all domains relevant to actual ability to function in society must be examined. The successful applicant would then qualify for services under the "other" or "fifth" category.

4. Additional information regarding eligibility is found in title 17, California Code of Regulations, section 54000(c). It provides that where the handicapping condition is solely physical in nature and not associated with neurological impairment, is solely due to a psychiatric disorder, or consists solely of learning disabilities, it is not a developmental disability for the purposes of the Lanterman Act.

SUMMARY AND DISCUSSION

Claimant would like to have help in obtaining and maintaining employment and in living independently. Claimant could use assistance in achieving her goals for a combination of reasons. She has serious learning disabilities, problems with mobility due to cerebral palsy, her English skills are limited due to her status as a fairly recent immigrant and she appears to lack family support, in that her mother no longer resides in California. However, it is not possible, given the evidence presented, to conclude that Claimant qualifies for regional center services pursuant to the Lanterman Act.

Claimant, thankfully, does not suffer from mental retardation. The most reliable test results place her in the low-average range for intelligence. Clearly, Claimant's learning disabilities make learning more difficult, but there was no evidence that she is unable to learn. The possibility of eligibility pursuant to the "fifth category" was also examined; however, she did not establish that she has a global impairment similar to mental retardation and/or one that requires similar services.

The regional center system was not designed to and legally cannot assist everyone who could benefit from assistance. Despite Claimant's struggles, she is capable of far more

than a mentally retarded individual. It is hoped that Claimant will continue to strive to learn and achieve her goals for independence. Although she does not qualify for regional center services, she may qualify for services from other government sources, such as the California Department of Rehabilitation. She may also continue her education through the community college system, where she will qualify for special assistance due to her learning disabilities.

CONCLUSION

Claimant is not eligible for regional center services due to mental retardation or pursuant to the "fifth category."

ORDER

Claimant Caridad A.'s appeal is denied.

DATED: February 9, 2006

MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.